91-1110

RECORD NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1991

WALLACE S. HARWOOD, JR.,

Petitioner,

v.

PARTREDEREIT af. 15.5.81,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

IS A HARBOR PILOT, TEMPORARILY EMPLOYED IN THE NAVIGATION OF A VESSEL, ENTITLED TO THE WARRANTY OF SEAWORTHINESS?

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PETITION FOR WRIT OF CERTIORARI TO THE U.S. FOURTH CIRCUIT COURT OF APPEALS

The Petitioner, Wallace S. Harwood, Jr., respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 5, 1991, reversing and remanding this case to the District Court, and the Order of October 8, 1991, denying a Petition for Rehearing.

OPINIONS BELOW

The opinion of the U.S. District Court for the Eastern District of Virginia, Norfolk Division, is reported as 1990 WL 14192 (E.D. VA), 1990 A.M.C. 1384 (E.D.Va. 1990).

The opinion of the U.S. Fourth Circuit Court of Appeals is reported as Harwood v. Partredereit AF 15.5.81, 944 F.2d 1187 (4th Cir. 1991) and is printed in the Appendix.

The Order of the U.S. Fourth Circuit Court of Appeals denying rehearing as of October 8, 1991 is printed in the Appendix.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

On September 5, 1991, the United States Court of Appeals for the Fourth Circuit entered its opinion and judgment reversing a judgment of the United States District Court for the Eastern District of Virginia, Norfolk Division. A timely filed Petition for Rehearing was denied by the Fourth Circuit by order entered October 8, 1991. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

33 USC Sec. 902 (3) (G)

> When used in this chapter the term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman,

shipbuilder, and ship-breaker, but such term does not include -- ...(G) a master or member of a crew of any vessel;...

33 USC Sec. 905 (a)

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee...

33 USC Sec. 905 (b)

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void...The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

46 USC Sec. 688

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying

> or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; ...

STATEMENT OF THE CASE

Petitioner Wallace Harwood is a Virginia State Pilot and member of a class of maritime workers whose roots descend deep into ancient maritime history and law. On December 16, 1987, he fell into the sea while boarding a vessel to assist in navigating it into Hampton Roads harbor. The ship's ladder broke while he was ascending it. The fall caused a permanent, disabling injury, and forced his early retirement.

Harwood sued the ship under two theories: first, that he was a Jones Act Seaman; and second, that under general maritime law he was entitled to both the exercise of reasonable care by the shipowner and the warranty of seaworthiness.

The Jones Act claim was dismissed by the District Court on Motion for Summary Judgment prior to trial. The Fourth Circuit test for Jones Act seaman status requires a more or less permanent connection with the vessel, which the Pilot admittedly did not have. A parallel Motion on the warranty of seaworthiness was denied. A Motion for a Directed Verdict by the Ship during trial on the issues of unseaworthiness and negligence was denied. Motions by both parties for Directed Verdicts at the conclusion of all the evidence were denied.

The case was submitted to the jury on the issue of contributory negligence of the Pilot, and on the issues of unseaworthiness and negligence of the Ship. In a general verdict for the Pilot, the jury found no contributory negligence and awarded $700,000.00 in damages. The Ship's motions following the verdict were

denied and judgment was entered on the verdict.

The Ship appealed to the United States Court of Appeals for the Fourth Circuit, which reversed and remanded. A majority of the Court held that the Pilot was a "maritime worker" under the Longshoremen's and Harbor Worker's Act ("LHWCA"), and was not a "master or member of a crew of a vessel" under that Act solely because he could not meet the Fourth Circuit Jones Act test as a "seaman". Therefor the Court concluded he was not entitled to the warranty of seaworthiness and the case was remanded for a new trial on negligence alone.

Chief Judge Ervin, in dissent, opined that the pilot was not covered by LHWCA as he was not a "maritime worker" but met the definition of a "master or member of a crew of a vessel", which he argued was not the same as that for a Jones Act "seaman". Judge Ervin

recognized that there is a substantial body of maritime workers who fall under neither LHWCA nor the Jones Act. He concluded that under Seas Shipping Co. v. Sieracki the pilot, as such a worker, was entitled to the warranty of seaworthiness.

Harwood sought a Rehearing and consideration in banc. On October 8, 1991, the United States Court of Appeals for the Fourth Circuit denied the Pilot's petition for rehearing with suggestion for rehearing in banc, 2-1.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT DECISION IN THIS CASE DENYING A HARBOR PILOT THE WARRANTY OF SEAWORTHINESS DEPRIVES A SUBSTANTIAL BODY OF MARITIME WORKERS OF A VITAL REMEDY.

The Court of Appeals held that the Jones Act and LHWCA "constitute the entire universe

of coverage for maritime workers performing navigational duties." However, while Jones Act status and coverage under LHWCA are "mutually exclusive" (Swanson v. Marra Bros., Inc., 328 U.S. 1, 7 (1946)), that is a worker must be one or the other not both, it is faulty logic to deduce from this that every maritime worker must inevitably be one or the other.

The duty of seaworthiness, imposed as far back as 1903 in The Osceola, 189 U.S. 158 (1903), places the duty on a vessel owner "to furnish a vessel and appurtenances reasonably fit for their intended use." Mitchell v. Trawler Racer, 362 U.S. 539, 550 (1960). Liability for seaworthiness arises from doing a seaman's work and incurring a seaman's hazards. Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 85, 95 (1946).

The need for extension of the humanitarian doctrine of the warranty of

seaworthiness to those who do the work of traditional seamen, but who are not covered by the Jones Act or LHWCA, was expressed by this Court in Sieracki, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), and Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 6245 (1959).

The harbor pilot is an expert with localized knowledge, who comes aboard a vessel temporarily to assure successful navigation through "the local shoals, eddies, sandbars, influence of localized tides, wind, current and the ever-growing industrial installations emerging from the commerical developments of the area." See Brown, Circuit Judge, dissenting in Bach v. Trident Steamship Co., Inc., 920 F.2d 322, 329 (5th Cir. 1991).

The specialized role of pilots has often been cited by this Court. Cooley v. Board of Wardens, 53 U.S. (12 How) 299 (1852) holds

constitutional federal legistlation permitting state compulsory pilotage as the regulation of navigation, recognizing the pilot as "the temporary master charged with the safety of the vessel and cargo, and of the lives on board, and intrusted with the command of the crew." The pilot has a lien in rem not only for pilotage services, but for services tendered but refused. Anderson v. Pacific Coast S.S.Co., 225 U.S. 187 (1912). The China, 74 U.S. (7 Wall) 53 (1868) holds the vessel liable in rem for the negligence of a compulsory pilot.

In addition to approximately twelve hundred state pilots like Harwood in the United States, who are strictly concerned with navigation, there are docking pilots, night mates, shore engineers, shore gangway watches, line handlers, and other workers who perform traditional work of seamen. None have a

permanent or even semi-permanent connection to the vessel. They are occasional and shore-based employees. South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940) and Norton v. Warner Co., 321 U.S. 565 (1944), demonstrate that there may be workers aboard a ship naturally and primarily to aid in navigation who, while not Jones Act seaman, nevertheless are "members of the crew" and are not covered by LHWCA.

The Fourth Circuit itself has recognized that the passage of the Jones Act and the LHWCA did not eliminate the general maritime law of the United States for workers not covered by either act. In Stephenson v. McLean Contracting Co., 863 F.2d 340, 341-2 (4th Cir. 1988), cert. denied, 109 S.Ct. 2110 (1989) and Whittington v. Sewer Const. Co., 541 F.2d 427, 433-4, 436 (4th Cir. 1976), it held the warranty of seaworthiness ran to

those "doing the work of a seaman", though the worker was not permanently attached to the vessel and therefor could not qualify as a seaman under the Jones Act. A harbor pilot certainly fits this description.

Other cases hold that the 1972 amendments to LHWCA did not affect workers not covered by the Act. Drake v. Raymark Industries, Inc., 772 F.2d 1007, 1013 (1st Cir. 1985); Aparicio v. Swan Lake, 643 F.2d 1109 (5th Cir. Unit A 1981).

The failure of Congress to define "seaman" in the Jones Act, and "master or member of a crew" in LHWCA leaves a major area of uncertainty in the law, an uncertainty which seriously affects the rights of this multitude of workers.

The Fourth Circuit's decision leaves harbor pilots together with other essential workers engaged in seamen's work and exposed

to seamen's hazards, with the monumental burden of proving negligence whenever they seek remedies for injuries at the hands of the ship.

Yet in order to carry out their duties they must board a ship they do not know and work with equipment they have had no chance to examine. Their safety is at the mercy of the shipowner. If the shipowner is compelled to furnish a seaworthy vessel to crewmen permanently attached to the vessel, these temporary "seamen" must be owed the same duty.

These many maritime workers who are unprotected by Jones Act or LHWCA remedies, but who perform a seaman's work and incur a seaman's hazards on the job, are entitled to the longstanding general maritime warranty of seaworthiness. The decision in this case, however, one of first impression in the Circuit courts, and which is now the leading

case on the subject, leaves this body of workers without this vital remedy. This is a situation which must be corrected, and their rights must be clearly and correctly defined.

II. DENYING THE WARRANTY OF SEAWORTHINESS TO A HARBOR PILOT REVERSES STATUTORY INTERPRETATION AND LEGISLATIVE HISTORY DATING BACK TO 1927.

Section 902(3)(G) of LHWCA exempts from coverage "masters or members of a crew of any vessel." In 1927, just after the adoption of the LHWCA, the United States Employees' Compensation Commission, charged with implementing the Act, was presented with this issue: "The question submitted...is whether or not injuries to pilots boarding vessels at sea or in port come within the compensation benefits of the LHWCA. The pilots referred to are those taken aboard a vessel for the purpose of conducting such a vessel into or

out of a port." (1928 A.M.C. 263). The Commission issued an official opinion that a temporary pilot is included within the term "master or member of a crew" and as such, is not covered by the Act. (33 U.S.C. Section 902(3)(G); 1928 A.M.C. 263). This opinion has never been amended or rescinded.

When Congress amended the Act in 1972, it was aware of the 1927 opinion classifying pilots as "a master or member of a crew." Yet the legislative history gives no indication of any intention to remove pilots from this classification.

The LHWCA was intended to cover longshoremen, ship repairmen, and those typically employed to load, unload, refit, and repair ships. Norton v. Warner Co., 321 U.S. 565 at 569.570 (1944). The 1972 amendments extended the Act shoreward and included the term "maritime employment" in defining the

workers it covered. The stated purpose of the amendment was to:

> extend coverage to longshoremen, harbor workers, and others who were injured while on piers, docks, and other areas customarily used to load and unload ships or to repair or build ships, rather than while actually afloat.

470 U.S. at 419-20; H. R. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 4698, 4708; S. Rep. No. 92-1125, 92d Cong., 2d Sess., at 13 (1972).

It is also undeniably true that Congress, with the same amendments, abrogated Sieracki recovery for unseaworthiness for all maritime employees covered by the Act.

The House Report states that:

> the rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-

> seamen working on board a vessel while it is in port.

H. R. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 4698, 4703.

Nowhere in the legislative history, however, does the Committee state that the purpose of the 1972 amendments was to overrule Sieracki entirely, or to deny the warranty of seaworthiness to those not covered by the Act. Yet the Fourth Circuit so held in this case.

Taken together, the full text of Section 902(3) and the exclusion in Subsection (G) for crewmen performing navigational duties, clearly show that "maritime employment" is "an occupational test that focuses on longshoring and ship maintenance operations, and not on activities associated with navigation." Harwood v. Partredereit AF. 15.5.81 944 F.2d 1187 (1991), (dissenting opinion). See Coloma v. Director, OWCP, 897 F.2d 394 (9th Cir.

1990), citing Herb's Welding, Inc. v. Gray, 470 U.S. 414, 423-24 (1985).

Examined as a whole, the language of LHWCA, its legislative history, and the Commission interpretation of it show that maritime employees whose duties are to aid in the navigation of the vessel are not among the class of workers which Congress intended to be covered by the LHWCA.

Therefore maritime workers who are neither Jones Act seamen, nor covered by the LHWCA, but who do the traditional work of seamen, must be afforded the general maritime warranty of seaworthiness - a warranty and remedy which has been available to protect "seamen" from the hazards of their jobs for over one hundred years.

In denying Petitioner this remedy the Fourth Circuit Court of Appeals has either misread or disregarded statutory history and

interpretation which have been relied upon in the maritime industry since 1927.

III. DENYING THE WARRANTY OF SEAWORTHINESS TO A HARBOR PILOT CONTRADICTS THE MAJORITY OF FEDERAL COURTS WHICH HAVE ADDRESSED THE ISSUE AND IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

Three Federal courts have addressed the specific question of whether the LHWCA covers harbor pilots, or whether they are excluded as a master or member of the crew. Only one has held a river pilot not to be a "master or member of a crew." Bach v. Trident Steamship Co., Inc., 708 F. Supp. 772, 775 (E.D.La. 1988), aff'd on other grounds, 920 F.2d 322 (5th Cir. 1991), vacated, 111 S.Ct. 2253 (1991). The Fifth Circuit in Bach did not directly address the issue presented here, but held a pilot was not a Jones Act seaman, and there was no showing of unseaworthiness.

Clark v. Solomon Navigation, Ltd., 631 F. Supp. 1275 (S.D.N.Y. 1986) (cited with approval in Marroquin v. American Trading Transportation Co., Inc., 711 F. Supp. 1165 (E.D.N.Y. 1988) and Coloma v. Director, OWCP, 897 F.2d 394 (9th Cir. 1990)), and Ringering v. Cia Maritima De-La-Mancha, 670 F. Supp. 301 (D.Ore. 1987), aff'd, 848 F.2d 1243 (9th Cir. 1988) hold that pilots are "members of a crew."

One lower federal court has taken this Court's decision in McDermott International, Inc. v. Wilander, 111 S.Ct. 807 (1991) as a holding that the multiple "tests" for Jones Act seaman status developed among the circuits have now been totally eliminated and has ruled that pursuant to Wilander a state Pilot is a Jones Act seaman when he is in the service of the vessel. Evans v. United Arab Shipping Co., 60 U.S.L.W. 2118 (D.C.N.J., Cir. No. 89-5246

(SSB) 7/30/91). That this interpretation is correct may at least be suggested by this Court's action in Bach, 111 S.Ct. 2253 (1991), when it vacated a Writ and remanded the case to the Fifth Circuit for reconsideration in light of Wilander, 111 S.Ct. 807 (1991) although the Fifth Circuit has not seen Wilander in that light.[1]

For the substantial group of workers affected by this Fourth Circuit decision, Southwest Marine, Inc. v. Gizoni, No. 90-584 (12/4/91) in this Court, decided December 4,

[1]Unpersuaded on remand that Wilander affected its decision that a pilot is not a Jones Act seaman, the Fifth Circuit has reinstated its previous judgment, again over a dissent, and Bach is once again Certiorari bound. 1991 WL 236863 (5th Cir., Dec. 2, 1991). Although it seems unlikely, in light of Gizoni, it is at least arguable that this Court intended in Wilander to narrow the focus as to Jones Act status to simply the worker's function on the vessel, regardless of such factors as "more or less permanent connection", see Evans. If that was the intent, then this case was decided in the District Court in the right way for the wrong reasons. Requiring a retrial would be judicial waste and an undue burden on the parties, and the Fourth Circuit's decision should be reversed per curiam on the basis of Wilander with directions to reinstate the jury verdict.

1991, may only add to the confusion, but once again Gizoni had a more or less permanent connection to the vessel in question and therefore could qualify for Jones Act status, unlike the type of workers addressed in this case.

This Court has never held that "seaman" as used in the Jones Act and "master or member of a crew" as used in the LHWCA are equivalent terms, such that only those who fully qualify for Jones Act status can be "members of the crew" under the LHWCA. See Swanson v. Mara Bros. Inc., 328 U.S. 1 (1946); Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957).

In Wilander this Court reiterated that "member of a crew" excludes Jones Act seamen from LHWCA coverage, and that "seaman" does not include land-based workers such as are covered by the LHWCA. 111 S.Ct. 813-814. In Gizoni this Court held that simply because a

maritime worker's occupation is enumerated in LHWCA, he is not ipso facto precluded from being a Jones Act seaman.

Nothing in either opinion, however, prevents the logical conclusion that transient workers such as Pilots, who are land-based but whose sole duties are in aid of navigation, and who are forced to serve under working conditions dictated and solely controlled by the vessel, are "masters or members of the crew" under LHWCA even if they do not fully qualify as Jones Act seamen.

In Gizoni and Wilander this Court said that "master or member of a crew" as a phrase in LHWCA is a "refinement" of the term "seaman" in the Jones Act. Wilander, 111 S.Ct. 807, 813 (1991); Gizoni, [1] _____ S. Ct. _____ (1991). These same cases recognize, first an expanded scope for "seaman" under the Jones Act to those not

necessarily engaged in the navigational function of the vessel, and second that one may be within the category of maritime employment encompassed by LHWCA but still be a "master or member of a crew of a vessel."

Indeed, the Court has recognized in Wilander that the term "seaman" under the general maritime law, as well as under the Jones Act, is a broad term which encompasses "all persons employed on board ships and vessels during the voyage to assist in their navigation and preservation, or to promote the purposes of the voyage". 111 S. Ct. at 812. "Master or member of a crew" should be given the same reading.

It is hard to conceive of a shore-based temporary worker more fully meeting the appellation "master or member of a crew" than a harbor pilot, who is engaged solely in navigation. Certainly such a person fits the

broadened scope of "seaman" encompassed by Wilander and Gizoni.

As discussed, both this Court and the Fourth Circuit have recognized in principal the existence of a third class of workers who are neither LHWCA nor Jones Act. The Fourth Circuit's decision in this case, a clear aberration, is in conflict in principle with Bassett and Norton v. Warner. It is in conflict in principle with Wilander and Gizoni. It is in conflict in principle with its own previous decisions. Harwood should not be allowed to stand as the leading case on this subject. It must be corrected.

CONCLUSION

Because the decision of the U.S. Fourth Circuit Court of Appeals in this case fails to recognize the essential nature of a pilot's work and abrogates substantial rights of a

large class of maritime workers; because it conflicts in principle with existing case law, and is counter to statutory history and interpretation long relied upon, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 8, 1991

No. 90-2351

WALLACE S. HARWOOD, JR.,

Plaintiff - Appellee,

v.

PARTREDEREIT AF 15.5.81,

Defendant - Appellant.

No. 90-2359

WALLACE S. HARWOOD, JR.,

Plaintiff - Appellant,

v.

PARTREDEREIT AF 15.5.81,

Defendant - Appellee.

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

WALLACE S. HARWOOD, JR.,
Plaintiff-Appellee,

v.

PARTREDEREIT AF 15.5.81,
Defendant-Appellant.

No. 90-2351

WALLACE S. HARWOOD, JR.,
Plaintiff-Appellant,

v.

PARTREDEREIT AF 15.5.81,
Defendant-Appellee.

No. 90-2359

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
John A. MacKenzie, Senior District Judge.
(CA-89-638-N)

Argued: December 3, 1990

Decided: September 5, 1991

Before ERVIN, Chief Judge, CHAPMAN, Senior Circuit Judge, and NORTON, United States District Judge for the District of South Carolina, sitting by designation.

Reversed and remanded by published opinion. Senior Judge Chapman wrote the majority opinion, in which Judge Norton joined. Chief Judge Ervin wrote a dissenting opinion.

COUNSEL

ARGUED: John E. Holloway, Richard T. Robol, HUNTON & WILLIAMS, Norfolk, Virginia, for Appellant. Peter W. Rowe, STACKHOUSE, ROWE & SMITH, Norfolk, Virginia, for Appellee. **ON BRIEF:** Philip N. Davey, HUNTON & WILLIAMS, Norfolk, Virginia, for Appellant.

OPINION

CHAPMAN, Senior Circuit Judge:

Plaintiff Wallace Harwood ("the pilot" or "Harwood"), a harbor pilot, was injured while attempting to board the defendant's ship, M/V CAPTAIN MOST. Harwood brought suit in federal court alleging causes of action under the Jones Act and general maritime law. The district court entered summary judgment for defendant on the Jones Act claim, and, after being instructed on negligence and unseaworthiness, the jury returned a verdict for the plaintiff in the amount of $700,000.00. Defendant appeals claiming that Harwood was covered by the Longshore and Harbor Workers' Act and it was prejudicial error to instruct the jury that he was owed the warranty of seaworthiness by the defendant.

At the time of the accident, Harwood was licensed as a pilot by the Commonwealth of Virginia for the waters from Cape Henry to Newport News and on the Elizabeth River. He was a member and part owner of the Virginia Pilot Association but functioned as an independent contractor. Pilotage in Virginia is governed by state statute. *See* Va. Code Ann. §§ 54.1-900 *et. seq.* (1988). These statutes require that a vessel owner accept the first Virginia pilot to offer his services or face a criminal penalty. Va. Code Ann. § 54.1-927 (1988).

On December 17, 1987, the M/V CAPTAIN MOST, a Danish flag vessel homeported in Svendborg, Denmark, called at Hampton Roads, Virginia in the early morning hours. Plaintiff was the first pilot to offer his services to pilot the ship into Hampton Roads. While attempting to board the vessel, the pilot ladder broke and Harwood

fell into the ocean. During the fall or while being pulled into the pilot launch, Harwood injured his shoulder severely enough to prevent him thereafter from working effectively as a pilot.

Harwood sued in the U. S. District Court for the Eastern District of Virginia alleging causes of action under the Jones Act and general maritime law. The district court granted defendant's motion for summary judgment on the Jones Act claim but denied defendant's summary judgment motion on the unseaworthiness claim. The case was tried on allegations of negligence and unseaworthiness. At the conclusion of the plaintiff's case, defendant moved for a directed verdict, arguing that as a matter of law, Harwood was not entitled to the warranty of seaworthiness and that the evidence was insufficient to support a finding of negligence. The district court denied the motion. At conclusion of defendant's case, both parties moved for a directed verdict. The motions were denied and the case went to the jury. Over the defendant's objection, the court instructed the jury on Harwood's unseaworthiness claim as follows:

> The claim of negligence and the claim of unseaworthiness in this case are separate claims, and you must consider them separately, in accordance with these instructions.
>
> . . .
>
> The plaintiff would be entitled to the warranty of seaworthiness. Under the maritime law the shipowner or operator owes to the plaintiff a nondelegable duty to keep and maintain the ship and all decks [in a seaworthy condition] . . . . Liability for an unseaworthy condition does not in any way depend upon negligence or blame or fault. That is to say, the owner or operator of a ship is liable for injuries and consequent damage proximately caused by an unseaworthy condition existing at any time, even though the owner or operator may have exercised due care under the circumstances and may have had no notice or knowledge of the unseaworthy condition which proximately caused the injury or damage.

The jury returned a verdict for Harwood in the amount of $700,000.00, and defendant timely appealed to this court.

This appeal presents two issues: (1) whether the district court erred in instructing the jury that plaintiff, a compulsory pilot, was owed the warranty of seaworthiness;[1] and (2) whether this seaworthiness instruction constituted prejudicial error. After considering the record and the applicable law, we conclude that it was prejudicial error to instruct the jury on the seaworthiness claim. We, therefore, reverse the judgment of the district court and remand this case for proceedings consistent with this opinion.

I. Warranty of Seaworthiness

The Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act") applies to "any person engaged in maritime employment" but does not apply to, among others, "a master or a member of a crew of any vessel." 33 U.S.C. § 902(3) (1988). Workers covered by the LHWCA are not entitled to a warranty of seaworthiness. 33 U.S.C. § 905(b) (1988).

A. "Maritime Employment"

Prior to 1972, coverage by the LHWCA was governed by a single situs requirement. *Director, Office of Worker's Compensation Programs v. Perini N. River Associates*, 459 U.S. 297, 298-301 (1983). This requirement extended LHWCA coverage only to those workers whose "disability or death result[ed] from an injury occurring upon the navigable waters of the United States (including any dry dock) . . . ." LHWCA of 1927, ch. 509, § 3(a), 44 Stat. 1426. The Supreme Court determined that a worker who, in the course of his duty, was required to go on navigable waters and who suffered an injury while

[1]Harwood suggests that he is entitled to the general maritime law warranty of seaworthiness regardless of the statutory analysis set out below. He relies on *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), for this proposition. His reliance is misplaced because Congress specifically overruled *Sieracki* with the 1972 amendments to the LHWCA. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 (1979) (the 1972 amendments intended to "overrule" *Sieracki*); 1972 U.S. Code Cong. & Ad. News 4702. Furthermore, this court has repeatedly ruled that the 1972 amendments "abolished" the *Sieracki* form of action. *See e.g., United States Lines, Inc. v. United States*, 593 F.2d 570 (4th Cir. 1979).

in that historically maritime locality, was covered by the pre-1972 LHWCA. *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962). Thus, coverage under the 1927 Act required no inquiry into "'what [the employee] was doing (or supposed to be doing) at the time of his injury.'" *Perini*, 459 U.S. at 311.

Under the 1972 amendments to the LHWCA, this relatively simple situs test was modified. The 1972 amendments required that, to be entitled to benefits, a disabled employee must (a) be disabled as the result of "an injury occurring upon the navigable waters of the United States," 33 U.S.C. § 903(a), the "situs" test; and (b) be engaged in "maritime employment" at the time of the injury, 33 U.S.C. § 902(3), the "status" test. Following enactment of the 1972 amendments, the Supreme Court decided that the amendments replaced the single situs requirement with a two-part situs and status standard. *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979); *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249, 264-65 (1977). Now both the status requirement, as defined by section 902(3), based on the nature of the job, and the situs requirement, as defined by section 903(a), based on location, must be satisfied for the LHWCA to apply. *Id.*

It is undisputed that Harwood was injured on the "navigable waters" of the United States, so at the time of his injury, he was engaged in employment that was compensable under the pre-1972 LHWCA. *See Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962). However, Harwood contends that as a pilot he was not engaged in "maritime employment" as required by the 1972 amendments to LHWCA. Harwood argues that while "maritime employment" includes loading and unloading vessels, ship repair, or similar work, it does not include pilotage. The Supreme Court in *Perini* considered this argument and rejected it. 459 U.S. at 315. In *Perini*, the plaintiff was injured while employed as a construction worker aboard a barge upon the actual navigable waters of the United States. The Court held that the construction worker was covered by the LHWCA even though his employment was not "maritime" in nature, because it was sufficient that he was injured on the navigable waters of the United States in the course of his employment. *Id.* at 324. The Court observed that, prior to the 1972 amendments, the LHWCA covered only workers who were injured on the navigable waters of the United States and that the amendments expanded coverage to include work-

ers injured while ashore if the worker was engaged in "maritime employment." Thus, the plaintiff in *Perini* qualified for pre-1972 coverage under the LHWCA. Since the amendments were enacted to *expand* the coverage of the LHWCA to shore side workers, and not to narrow its coverage, the Court ruled that the plaintiff was covered by the LHWCA regardless of the nature of his employment because he was injured on the navigable waters of the United States. *Id.* at 323-24.

The Supreme Court reaffirmed this approach to LHWCA coverage in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985). Gray was a welder and was injured while employed on a stationary drilling platform within Louisiana's territorial waters. The Court, finding that the drilling platform was an island, analyzed the limits of LHWCA coverage under the test for landward coverage, and concluded that since the welder's work was "far removed from traditional LHWCA activities," 470 U.S. at 425, and therefore not maritime in nature, the welder failed the status requirement for landward coverage. 470 U.S. at 424-26. The Court qualified this holding as follows:

> This view of "maritime employment" does not preclude benefits for those whose injury would have been covered before 1972 because it occurred "on navigable waters." *Director, OWCP v. Perini North River Associates*, 459 U.S. 297 (1983).
>
> . . .
>
> [W]e point out that [*Perini*] was carefully limited to coverage of an employee "injured while performing his job upon actual navigable waters." 459 U.S. at 299.

Herb's Welding, 470 U.S. at 424, n.10.

We hold that seaward coverage under the LHWCA does not depend on the nature of the worker's duties. The 1972 amendments to LHWCA do not affect the pre-1972 meaning of "maritime employment" as to workers injured on navigable waters of the United States, because one injured on navigable waters in the course of his employ-

ment satisfies both the pre- and post-1972 LHWCA meaning of "maritime employment." When the injury occurs on navigable waters, it satisfies both the "situs" and the "status" test. Therefore, Harwood, who was injured on the navigable waters of the United States, was engaged in "maritime employment."

B. "Master or Member of a Crew"

The pilot also contends that he was a "master or member of a crew" and therefore specifically excluded from LHWCA coverage by 33 U.S.C. § 902(3)(G). The test to be applied in ascertaining whether a person is "a member of a crew" for purposes of LHWCA is the same as applied in determining whether a person is a "seaman" for purposes of Jones Act jurisdiction. Applying such test, we find that the pilot in this case is not a "master or member of a crew" and is therefore covered by the LHWCA.

As the Fifth Circuit noted in *Hardaway Contracting Company v. O'Keeffe*, 414 F.2d 657 (5th Cir. 1968), "[f]or a time there seemed to be the possibility that the Supreme Court recognized that the term 'members of a crew of a vessel,' as used in the [LHWCA] might be a more restricted term than the word 'seaman' as used in the Jones Act." *Id.* at 659. However, based upon the Supreme Court's decisions in *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946), and *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957), it has become clear that "seaman," as used in the Jones Act, and "member of a crew," as used in the LHWCA, are equivalent terms. *See Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 982-83 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988); *Bertrand v. Int'l Mooring & Marine Inc.*, 700 F.2d 240, 243-44 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984); *McDermott Inc. v. Boudreaux*, 679 F.2d 452, 457-58 (5th Cir. 1982); *Travelers Ins. Co. v. Belair*, 412 F.2d 297, 302 (1st Cir. 1969); *Hardaway Contracting Co. v. O'Keeffe*, 414 F.2d 657, 659-60 (5th Cir. 1968).

In considering plaintiff's Jones Act claim, the district court correctly applied the test for "seaman" or "member of a crew" status articulated by this court in *Stephenson v. McLean Contracting Co.*, 863 F.2d 340, 341 (4th Cir. 1988), *cert. denied*, _ U.S. _, 109 S. Ct. 2110 (1989):

> [A worker] must be a member of a crew of a vessel . . . to be a "seaman" under the coverage of the Jones Act . . . . [There are] three requirements for a worker to be considered "a member of a crew": 1) the worker must be more or less permanently attached to a vessel or fleet; 2) the worker must be one whose duties serve naturally and primarily as an aid to navigation in the broadest sense; and 3) the vessel must be in navigation.

Stephenson, 863 F.2d at 341. The district court correctly determined that Harwood failed the first prong of this test, because he was not "more or less permanently attached" to the M/V CAPTAIN MOST, and the district court correctly entered summary judgment for defendant on the Jones Act claim. The district court should have applied the same reasoning to plaintiff's seaworthiness claim. Just as the pilot is not a "seaman" for purposes of the Jones Act, he is not a "member of a crew" under the LHWCA.[2] Therefore, the pilot cannot avail himself of section 902(3)(6)'s "master or member of a crew" exclusion from coverage under the LHWCA. Furthermore, since section 905(b), 33 U.S.C. § 905(b), provides that workers covered by the LHWCA are not entitled to the warranty of seaworthiness, the district court erred in instructing the jury on plaintiff's seaworthiness claim.

II. Effect of Improper Jury Instruction

We must determine whether the district court's seaworthiness instruction constituted prejudicial error. The pilot contends that the

[2]Since this case was argued, the Supreme Court has had occasion to consider the definition of "master or member of a crew" under the LHWCA. In *McDermott Int'l, Inc. v. Wilander*, _ U.S. _, 59 U.S.L.W. 4091 (U.S. Feb. 19, 1991), the Court stated that "master or member of a crew" should be defined "solely in terms of the employee's connection to a vessel in navigation." *Id.* at 4096. Thus, the Court reinforced the importance of the first prong of the *Stephenson* definition while expressly "jettison[ing] the aid in navigation language" included in *Stephenson*'s second prong. *Id.* Our holding in this case is consistent with the Court's opinion in *McDermott*. Since Harwood was not "more or less permanently attached" to the M/V CAPTAIN MOST, he cannot satisfy the definition of "master or member of a crew" under the LHWCA.

instruction was harmless error, but we disagree. The district court instructed the jury on two independent theories of liability (negligence and unseaworthiness) and the jury returned a general verdict in favor of the plaintiff for $700,000.00. Since the defendant may be liable only under a negligence theory, we must closely examine the possible impact of the district court's improper seaworthiness instruction with its no-fault standard of liability. We have held that when a party is prejudiced by an improper instruction, this court should reverse and remand the case for a new trial even when there may be enough evidence to support the jury's verdict on other grounds. *Hodges v. Evisea Maritime Co.*, 801 F.2d 678, 687 (4th Cir. 1986), *cert. denied*, 480 U.S. 933 (1987). When a jury is instructed on two theories of liability, one which is proper and the other which is not, the court must remand the case for a new trial unless it is "'reasonably certain' that the jury's verdict was not influenced by the erroneously-submitted . . . theor[y]." *Woods v. Sammisa Co.*, 873 F.2d 842, 853-54 (5th Cir. 1989), *cert. denied*, _ U.S. _, 110 S. Ct. 853 (1990); *see also Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734, 742 (5th Cir. 1980). Here, the jury returned a general verdict against the defendant. We do not have the benefit of answers to interrogatories accompanying the verdict and cannot determine on which theory the jury reached its decision. There is a significant risk that the jury, having been improperly instructed on the seaworthiness claim, relied upon this erroneous instruction in arriving at its verdict. Therefore, we find that the district court's seaworthiness instruction constitutes prejudicial error.

III.

For the foregoing reasons, we find that the district court committed prejudicial error in instructing the jury on plaintiff's seaworthiness claim. Accordingly, we reverse the judgment of the district court and remand this case for proceedings consistent with this opinion.

REVERSED AND REMANDED

ERVIN, Chief Judge, dissenting:

The majority is clearly correct in its statement that workers who are covered by the Longshore and Harbor Workers' Compensation Act (Act, or LHWCA) are not entitled to the warranty of seaworthiness.

33 U.S.C.A. § 905(b) (1986). However, because I conclude that Appellant Harwood, as a harbor pilot, is not covered by the Act, I must part company with the majority as to all of its subsequent assertions with regard to the relation between harbor pilots and the Act. I find that the district court's determination that harbor pilots such as Harwood retain access to the warranty of seaworthiness is supported by precedent and completely in accord with the intent Congress expressed in amending the Act.

I.

The 1927 Act was designed to provide uniform federal coverage for land-based harbor workers such as longshoremen and ship repairers who were injured while working on vessels upon the navigable waters of the United States and were ineligible to recover state workers' compensation benefits.[1] The Act did not extend benefits to seamen or vessel crew members, who were entitled to a separate remedy under the Jones Act, 46 U.S.C. § 688. In effect, the 1927 Act amended the Jones Act to make Jones Act benefits available only to maritime workers who were not covered by the 1927 Act. Workers whom the 1927 Act covered also retained access to a general maritime cause of action for personal injury against shipowners, not their employers, under the warranty of seaworthiness.[2]

Congress amended the Act in 1972 to extend coverage to workers whose injuries occurred not only on the navigable waters of the United States but also on adjacent land-based work locations. 33 U.S.C.A. § 903(a) (1986). The amended Act reworded the definition of "employee" to emphasize job function, expressly providing coverage for workers engaged in occupations such as longshoring, shipbuilding, and ship repairing, and retained the 1927 Act's exclusion from coverage of "a master or member of a crew of any vessel." 33 U.S.C.A. § 902(3) (1986). In exchange for the increased amounts of compensation the amended Act provided, Congress withdrew the covered workers' access to any other remedy against the vessel, including

[1]Act of March 4, 1927, Ch. 509, 44 Stat. 1424 (codified as amended at 33 U.S.C. §§ 901-950).

[2]See discussion, *infra*.

the warranty of seaworthiness. 33 U.S.C.A. § 905(b) (1986); H. R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698, 4703.

Neither the pre-1972 nor the amended Act specifically includes harbor pilots among the covered employees or defines "master or member of a crew." Soon after the 1927 Act was enacted, however, the United States Employees' Compensation Commission, the body in charge of implementing the Act, issued an opinion explicitly stating that a temporary pilot of a vessel is included within the term "master or member of a crew" as used in Section 902, and thus is not among the persons protected by the Act. *Longshoremen's Act, Opinion No. 22*, 1928 A.M.C. 263 (November 26, 1927). Congress is presumed to have been aware of this official interpretation when it amended the Act in 1972. Moreover, this ruling is congruent with the Supreme Court's definition of "crew" for purposes of the Act. In *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1939), the Court held that the Act was intended to cover harbor workers such as laborers and longshoremen, as distinguished from those employees who are "naturally and primarily on board to aid in [the ship's] navigation." 309 U.S. at 259-60; *accord Whittington v. Sewer Constr. Co.*, 541 F.2d 427, 434 (4th Cir. 1976). It is undisputed that the harbor pilot's duty while on board ship is to navigate the ship into port.

Of the three federal courts which have addressed the question whether the Act covers harbor pilots, only one holds that a river pilot is not a "master or member of a crew." *See Bach v. Trident Steamship Co., Inc.*, 708 F. Supp. 772, 775 (E.D. La. 1988), *aff'd on other grounds*, 920 F.2d 322 (5th Cir. 1991), *vacated*, _ U.S. _, 111 S. Ct. 2253 (1991).[3] The remaining decisions reflect the official opinion that pilots are "members of a crew." *Clark v. Solomon Navigation, Ltd.*,

[3]No reported decision to date has cited *Bach* for this proposition. The appeals court, in affirming the district court's finding that the harbor pilot Bach failed to meet the causation requirements necessary to prevail on his negligence claim, observed that the record did not clearly reveal whether Bach was covered by the Act. 920 F.2d at 327. The Supreme Court granted *certiorari* and on June 3, 1991 vacated the judgment, remanding it to the Fifth Circuit for further consideration in light of *McDermott International, Inc. v. Wilander*, 111 S. Ct. 807 (1991) (discussed *infra*).

631 F. Supp. 1275 (S.D.N.Y. 1986);[4] *Ringering v. Cia Maritima De-La-Mancha*, 670 F. Supp. 301 (D. Ore. 1987). Common sense verifies this conclusion. In order to carry out his duties, the harbor pilot must board a ship he does not know and work with equipment he has not had a chance to examine. If the shipowner has a duty to provide a seaworthy vessel and equipment to the members of the crew, who have been excluded from the Act so that they may retain the benefit of that warranty as well as other general maritime remedies, surely the harbor pilot performing navigational duties aboard the ship with that same equipment is owed the same duty.

The majority presents as a matter of settled law the proposition that the test for determining whether an individual is a "member of the crew" for purposes of the Act is the same as the test applied in ascertaining whether the individual is a "seaman" under the Jones Act; in other words, that a maritime worker's status under the Act is defined solely by whether or not he qualifies as a Jones Act seaman.[5] Yet in only one Circuit, the Fifth, have the federal courts explicitly so held.[6]

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[4]*Clark* has been cited with approval in *Marroquin v. American Trading Transportation Co., Inc.*, 711 F. Supp. 1165 (E.D.N.Y. 1988) and *Coloma v. Director, OWCP*, 897 F.2d 394 (9th Cir. 1990).

[5]The Jones Act test as it is applied in this Circuit requires fulfillment of the following criteria: (1) the seaman must be more or less permanently attached to a vessel or fleet; (2) the seaman must be one whose duties serve naturally and primarily as an aid to navigation in the broadest sense; and (3) the vessel must be in navigation. *Stephenson v. McLean Contracting Co.*, 863 F.2d 340, 341 (4th Cir. 1989); *Whittington v. Sewer Constr. Co.*, 451 F.2d 427, 436 (4th Cir. 1976). Harbor pilots can rarely meet this test because they are usually not "more or less permanently attached" to the ships on which they work. In the case at hand, the district court ruled that Harwood did not qualify as a Jones Act seaman for exactly that reason. *Harwood v. Partredereit af. 15.5.81*, CA-89-638-N, slip op. at 2-3 (E.D. Va. 1990).

[6]Appellate decisions outside the Fifth Circuit which state that Jones Act seaman status and "member of a crew" status under the Act are equivalent have involved plaintiffs who were longshoremen or ship construction personnel. Thus these courts were not faced with the issue of a worker such as a harbor pilot who by the nature of his work is not covered by the Act and can virtually never achieve Jones Act status. *See, e.g., Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir.), *vacated on other grounds*, 462 U.S. 1101 (1982) (plaintiff was a pile driver); *Travelers Ins. Co. v. Belair*, 412 F.2d 297, 302 (1st Cir. 1969) (plaintiff was a carpenter).

See, e.g., Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977, 982-83 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988); *Hardaway Contracting Co. v. O'Keeffe*, 414 F.2d 657, 659-60 (5th Cir. 1968).

Despite this aberrant line of cases, there is nothing in the statute or the legislative history to support the contention that, in order to qualify for status as a "master or member of the crew" under the Act, a maritime worker *must* meet the Jones Act test. It is true that Jones Act status and coverage under the Act are mutually exclusive: an employee covered under the Act cannot also be covered under the Jones Act, and if an employee meets the Jones Act criteria he will automatically be excluded from Act coverage because he will also be a "master or member of the crew." It does not follow logically from this, however, that the *sole* criterion for establishing "master or member of the crew" status is the Jones Act test, or that the Jones Act and the Act constitute the entire universe of coverage for maritime workers performing navigational duties. The law in this Circuit recognizes that passage of the Jones Act and LHWCA did not eliminate the general maritime law of the United States for seamen who are not covered by either act. *See Stephenson v. McLean Contracting Co.*, 863 F.2d 340 (4th Cir. 1989), and *Whittington, supra*, 541 F.2d at 436 (in both cases, plaintiffs were construction workers who claimed only Jones Act status; court acknowledged that warranty of seaworthiness existed but was not applicable where plaintiffs could not qualify for admiralty jurisdiction).

Contrary to the majority's assertion, the Supreme Court has never held that "seaman" as used in the Jones Act and "member of a crew" as used in the Act are equivalent terms, in the sense that only those who qualify for Jones Act seaman status can be "members of the crew" under the Act. The cases cited in support, *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946), and *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), do not reveal such a holding even upon the most imaginative of readings. *Swanson* speaks only to *longshoremen*, holding that a longshoreman injured on the dock was not covered either by the 1927 Act or by the Jones Act and must resort to state compensation laws. The Court stated no more than that the Jones Act and the Act are mutually exclusive. 328 U.S. at 7. *Senko* states that Jones Act coverage extends to "members of a crew," but does not hold that the Jones Act is their exclusive remedy. *Senko*

merely indicates that such workers, pre-1972, were *entitled to recover* under the Jones Act. 352 U.S. at 373.

The Supreme Court's most recent opinion addressing seaman status for Jones Act purposes goes no further toward stating the rule the majority favors than did *Swanson* and *Senko*. *McDermott International, Inc. v. Wilander*, _ U.S. _, 111 S. Ct. 807 (1991). In *McDermott*, the narrow issue the Court faced was whether a paint foreman injured on an oil drilling platform in the Persian Gulf while assigned to a "paint boat" carrying his painting equipment qualified as a Jones Act seaman. The Court unanimously affirmed the Fifth Circuit's finding that the plaintiff qualified under the Fifth Circuit's test for Jones Act seaman status, which did not require that a worker must aid in the navigation of a vessel in order to be a Jones Act seaman. In the process of illustrating that the intervention of the Act did not change the Fifth Circuit's rule, the Court repeated that the term "member of the crew" excludes Jones Act seamen from Act coverage, and further stated that "seamen" do not include land-based workers such as are covered by the Act. 111 S. Ct. 813-14. The Court's "land-based" and "sea-based" language is used solely in the context of distinguishing LHWCA workers from Jones Act seamen.

In fact, the Court recognized that the term "seaman," under general maritime law as well as under the Jones Act, is a broad term encompassing *all* who are in service of the vessel. The Court reiterated that the long-established definition of a mariner, or seaman, includes "all persons employed on board ships and vessels *during the voyage to assist in their navigation and preservation*, or to promote the purposes of the voyage." 111 S. Ct. at 812 (citing E. Benedict, *The American Admiralty* § 278, at 158 (1850) (emphasis added)). Nothing in the Court's opinion prevents the conclusion that harbor pilots, who are land-based but perform navigational duties and serve under working conditions dictated solely by a vessel, may be "members of the crew" even if they do not qualify as Jones Act seamen.

Nor does a harbor pilot qualify for coverage under the Act by virtue of engaging in "maritime employment." When the full text of Section 902(3) is read together with the exclusion in Subsection (G) for crewmen performing navigational duties, it is apparent that the "maritime employment" requirement is an occupational test that focusses

on longshoring and ship maintenance operations, and not on activities associated with navigation. *See Coloma v. Director, OWCP*, 897 F.2d 394 (9th Cir. 1990), citing *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423-24 (1985) (while "maritime employment" is not limited to the occupations specifically mentioned in Section 902(3), "neither can it be read to eliminate any requirement of a connection with the loading or construction of ships.").

In *Herb's Welding*, the Supreme Court rejected the Fifth Circuit test which defined "maritime employment" as employment having a significant relationship to traditional maritime activity. *Id.* at 423, 414. The Court emphasized that Congress's most important concern in enacting the 1972 amendments was

> . . . the desire to extend coverage to longshoremen, harborworkers, and others who were injured while on piers, docks, and other areas customarily used to load and unload ships or to repair or build ships, rather than while actually afloat.

470 U.S. at 419-20; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698, 4708; S. Rep. No. 92-1125, 92d Cong., 2d Sess., at 13 (1972). *Accord Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 316-17 (1983).[7] *See also Clark v. Solomon, supra* (cited by the Ninth Cir-

[7]The majority cites *Perini* in support of its theory that the Supreme Court considered and rejected the argument that "maritime employment" does not include pilotage. What the Court actually considered and rejected, however, was the assumption, made by the Second Circuit, that "maritime employment" must necessarily involve a significant relationship to navigation or to commerce on navigable waters. Nowhere in *Perini* did the Court mention pilotage, or link any navigation-related activity to the "maritime employment" category.

Perini holds that the Act *does not require the employee to show* that his employment possesses "a significant relationship to navigation or to commerce" in order to obtain coverage, where the employee is injured while working upon the actual navigable waters in the course of his employment *and* would have been covered under the pre-1972 Act. At the time of injury, the worker in *Perini* was on the deck of a cargo barge directing the unloading of sewage pipes that were to be used in constructing the foundation of

cuit in *Coloma*, *supra*, 897 F.2d at 399, for having correctly applied the *Herb's Welding* test in its analysis of harbor pilot coverage under the Act).

The statutory language, legislative history, and interpreting case law combine to indicate that maritime employees who are engaged in navigation, and not as longshoremen or construction workers, are not among the group of workers Congress intended to reach in extending the Act's coverage. In particular, harbor pilots such as Harwood, whose sole work is navigation, have no cause of action under the Act and must find their remedies elsewhere.

II.

The general maritime law warranty of seaworthiness covers maritime workers who, like Harwood, have no remedy for employment-related injury under either the Act or the Jones Act. The duty of seaworthiness, which was imposed as early as 1903 with *The Osceola*, 189 U.S. 158, obligates a vessel owner "to furnish a vessel and appurtenances reasonably fit for their intended use." *Mitchell v. Trawler Racer*, 362 U.S. 539, 550 (1960). Seamen crew members are the beneficiaries of the warranty of seaworthiness and may recover for injuries sustained because of the unseaworthy condition of their vessel. The duty imposes a standard of strict liability, completely divorced from concepts of negligence. *Id.*, 362 U.S. at 440.

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a sewage treatment plant. The Second Circuit held that the worker was not involved in "maritime employment" because the sewage treatment facility was not ultimately to be used in navigation or in commerce upon navigable waters. The Supreme Court reversed, holding that a *marine construction worker* who was covered under the pre-1972 Act will not lose coverage after 1972 just because he was injured while working on a task that did not involve navigation or commerce. 459 U.S. at 323-24.

Perini reinforces what the legislative history of the amended Act and Section 902(3) makes clear: "maritime employment" involves traditional longshoring and construction activities. Even if *Perini* held as the majority claims, the holding would be questionable in the light of the later *Herb's Welding*.

The warranty of seaworthiness is separate and independent of statutory and other general maritime remedies, such as maintenance and cure. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 498 (1971). The scope of the class of persons to whom the warranty of seaworthiness is owed was greatly expanded in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). *Sieracki* extended the warranty to longshoremen who were not directly employed by the ship on which the injury occurred.[8] In subsequent rulings, the Supreme Court reaffirmed the *Sieracki* principle that the warranty of seaworthiness should extend to that group of workers who needed the doctrine's protection because they were subjected to the same dangers as those seamen crew members directly employed by the vessel. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 413 (1953); *Kermarac v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

The majority claims that Congress overruled *Sieracki* by means of the 1972 amendments to the Act, so that the *Sieracki* cause of action for warranty of seaworthiness no longer exists. On the contrary, the legislative history and case law cited by the majority affirm that, for workers such as Harwood who are excluded from the coverage of the Act, *Sieracki* remains very much alive.

It is undeniable that, in the processing of amending the Act, Congress abolished the *Sieracki* action for unseaworthiness for all maritime employees who come within the coverage of the Act. The House Report states:

> *Persons to whom compensation is payable under the* Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness.

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[8] *Sieracki* held that the availability of the unseaworthiness remedy did not depend on the existence of a contractual relationship between the plaintiff and shipowner. The duty stemmed rather from the fact that the shipowner had agreed to the plaintiff's performance of service on his ship. *Sieracki*, *supra*, 328 U.S. at 96. The Court's opinion was based on the fact that the seaworthiness remedy historically was derived from "the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility." *Id.* at 94.

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698, 4703 (emphasis added). The Committee went on to say that

> [t]he rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to *longshoremen and other non-seamen* working on board a vessel *while it is in port*.

Id. (emphasis added). The Committee's purpose was to eliminate the end-run around the Act's limit on employer liability that was occurring as a result of the combination of *Sieracki* and *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956). *Ryan* subjected the employer of a longshoreman injured aboard a ship to liability for damages incurred by the ship when the worker sued the ship under *Sieracki*, by allowing the ship to recover those damages from the employer. 1972 U.S. Code Cong. & Admin. News at 4702. Employers were thus, contrary to the intention of the 1927 Act, exposed to no-fault liability. By making the *Sieracki* action unavailable to the longshoremen and other non-seamen covered by the Act, Congress restored the effectiveness of the Act's limitation of employer liability to a negligence standard.

Nowhere in the legislative history does the Committee state that its intention was to overrule *Sieracki* absolutely, or to deny the warranty of seaworthiness to any but employees covered by the Act. Despite the majority's assertion, neither has this court held that Congress overruled *Sieracki* for employees not covered by the Act. In fact, in *Whittington*, *supra*, we acknowledged that *Sieracki* still provides the warranty of seaworthiness. 541 F.2d at 433. *See also Stephenson*, *supra*, 863 F.2d at 340. Our decision in *United States Lines, Inc. v. United States*, 593 F.2d 570 (4th Cir. 1979) says nothing more than that the 1972 Amendments overruled *Sieracki—with respect to employees covered by the Act*. 593 F.2d at 572;[9] *accord Drake v. Ray-*

[9]In *United States Lines* we did not have to consider *Sieracki* because the plaintiff was covered under the Federal Employees' Compensation Act. The 1972 Amendments' only effect in this case was to cut off the indemnity action between the shipowner and the employer United States Government. *United States Lines*, *supra*, 593 F.2d at 572. Until the present appeal, we have not directly confronted the issue of whether seamen not covered under the Act or the Jones Act retain their *Sieracki* cause of action.

mark Industries, Inc., 772 F.2d 1007, 1013 (1st Cir. 1985), *cert. denied sub nom. Raymark Industries v. Bath Iron Works Corp.*, 476 U.S. 1126 (1986); *Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. Unit A 1981) (holding that 1972 Amendments had no effect on persons not covered by the Act).

The fact that Harwood is a compulsory pilot does not interfere with his coverage under *Sieracki*. *Sieracki* holds that the contractual (*i.e.*, consensual) relationship between the worker and the master is not the basis of the liability for seaworthiness. 328 U.S. at 96. The liability arises, not as an incident merely of the seaman's contract, but of performing the ship's service—doing a seaman's work and incurring a seaman's hazards—with the owner's consent or by his arrangement. *Id.* at 95, 99.

Moreover, under Virginia's statutory scheme, the ship's master actually does have the power to consent to the service rendered by a particular pilot. Va. Code Ann. §§ 54.1-900 - 54.1-927 (Rep. vol. 1988 & Supp. 1990). Licensed Virginia pilots testified at trial that the master retains command of the vessel and may reject a particular pilot. The Virginia statutory system may in effect compel the use of a pilot licensed by the Commonwealth, but ultimately the master must consent to the manner in which the particular pilot conducts his services.

In amending the 1927 Act, Congress can hardly have intended to deprive harbor pilots, who perform not longshoreman work but traditional seaman's duties, and who in most cases are not eligible for Jones Act protection, of their only remaining maritime remedy. The majority, by reading the amended Act and its legislative history far more broadly than the text itself supports, appears determined to accomplish this exclusion in spite of Congress's failure to do so.

Because the district court's instruction to the jury on strict liability under the warranty of seaworthiness represented a correct statement of the law, and because the jury's finding that the shipowner was liable under that standard was supported by evidence from which a reasonable jury could have drawn this conclusion, the jury's verdict should be upheld and the district court's actions affirmed.

On Petition for Rehearing with Suggestion for Rehearing in Banc

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Appellee/cross-appellant filed a petition for rehearing with suggestion for rehearing in banc.

Judge Ervin voted to grant panel rehearing. Judge Chapman and Judge Norton voted to deny.

No member of the Court requested a poll on suggestion for rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Chapman, with the concurrence of Judge Ervin and Judge Norton.

For the Court,

_____

Clerk

Supreme Court, U.S.
FILED
FEB 6 1992
OFFICE OF THE CLERK

(2)

DOCKET NO. 91-1110

IN THE

Supreme Court of the United States

October Term 1991

WALLACE S. HARWOOD, JR.,

Petitioner,

v.

PARTREDEREIT af. 15.5.81.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

WHETHER THE LONGSHORE HARBOR WORKERS' COMPENSATION ACT COVERS A LAND-BASED HARBOR PILOT PROVIDING TEMPORARY MARITIME SERVICES TO A VESSEL WHEN THE PILOT CONCEDES HE IS NOT A JONES ACT SEAMAN.

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I. Statement of the Case

This case arises out of a personal injury sustained by Wallace Harwood while employed as a harbor pilot on navigable waters. Harwood was injured while attempting to board the M/V CAPTAIN MOST, a Danish flag vessel homeported at Svendborg, Denmark. Harwood filed this action against the owner of the M/V CAPTAIN MOST[1] seeking recovery under the Jones Act and the general maritime law.

It is undisputed that Harwood was a land-based maritime worker who was injured in the course of his employment while on the navigable waters of the United States. Petition at 5, 9, 10-11; Harwood v. Partredereit, 944 F.2d 1187, 1190 (4th

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[1]Partredereit af. 15.5.81 is organized under the laws of Denmark. It is not a parent, subsidiary or affiliate of any publicly held corporation.

Cir. 1991). In his Petition, Harwood states that he has no "permanent or even semi-permanent connection to the vessel." Petition at 10-11. He describes his employment on vessels as "occasional and shore-based." Id. Virginia pilots enjoy a statutory monopoly and their services are forced on foreign vessels by compulsion of civil and criminal penalties. See Va. Code §§ 54.1-900 to -927 (Repl. Vol. 1988 & Supp. 1990).

The district court granted the vessel owner summary judgment on Harwood's Jones Act claim. The court concluded that Harwood was not a Jones Act seaman because his "relationship to the vessel was solely temporary or transitory." Harwood v. Partredereit, 1990 A.M.C. 1384, 1385 (E.D. Va. 1990). Harwood did not appeal this ruling and has abandoned any claim of "seaman" status under the Jones Act. For

purposes of this appeal, therefore, it is established that Harwood is not a Jones Act seaman.

The case was tried on Harwood's general maritime law claims based on alleged unseaworthiness and negligence. Over the vessel owner's objection, the district court instructed the jury on Harwood's strict liability unseaworthiness theory. The court also instructed the jury on Harwood's negligence claim. The jury returned a general verdict for Harwood for $700,000. The district court denied the vessel owner's motions for a directed verdict and for judgment notwithstanding the verdict.

Because the jury was improperly instructed on Harwood's strict liability unseaworthiness theory, the Fourth Circuit reversed and remanded this case for a new trial on principles of negligence. The

Fourth Circuit held that Harwood was covered by the Longshore and Harbor Workers' Compensation Act and therefore not entitled to a warranty of seaworthiness pursuant to section 905(b). 33 U.S.C. § 905(b).

II. Summary of Argument

Harwood's request for Supreme Court review is based on two contentions: 1) The Fourth Circuit decision is incorrect; and 2) The Fourth Circuit decision has broad implications for maritime workers. Both contentions are meritless.

A. The Fourth Circuit Correctly Decided This Case.

Harwood's Petition presents no legitimate basis for Supreme Court review and Harwood's contentions are flatly contradicted by clear decisions of this Court. Nonetheless, he charges that the

Fourth Circuit holding "is a clear aberration." To the contrary, each element of the Fourth Circuit's reasoning is supported by decisions of this Court and the Courts of Appeals. Indeed, this Court recently addressed and decided these coverage issues. The Fourth Circuit's application here of the principles stated in this Court's decisions does not conflict with authority from any other Court of Appeals. Absent any conflict among the circuits, this Court should not revisit issues so recently decided.

B. **The Fourth Circuit's Holding Was Narrow and Fact Specific; It Is Not of National Significance.**

The Fourth Circuit holding does not have broad implications for maritime workers. In support of his argument, Harwood presents a novel and unprecedented interpretation of the LHWCA which, if

accepted, would dramatically reduce the number of workers covered by the LHWCA. The Fourth Circuit properly rejected Harwood's interpretation and, instead, correctly applied to the particular undisputed facts of this case well-established principles of LHWCA interpretation. The Fourth Circuit's narrow and fact specific holding does not have broad implications for maritime workers. It is not of national significance.

III. ARGUMENT

A. Background

The Jones Act, 46 U.S.C. App. § 688, and the Longshore Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, are a mutually exclusive pair of remedial statutes for maritime workers. McDermott Intern., Inc. v. Wilander, ___ U.S. ___, 111 S. Ct. 807, 817 (1991). The Jones Act

provides a negligence remedy to "seamen." 46 U.S.C. App. § 688. Vessel owners also owe Jones Act seamen a warranty of seaworthiness. The LHWCA provides uniform compensation remedies to all persons who are injured while engaged in "maritime employment" except those specifically excluded. Wilander, 111 S. Ct. at 817; G. Gilmore & C. Black, The Law of Admiralty 404-08 (2d ed. 1975). One exclusion covers "a master or member of a crew of any vessel," which excludes from coverage Jones Act seamen. Wilander, 111 S. Ct. at 813; see 33 U.S.C. § 902(3)(G). Under the LHWCA, a worker's exclusive remedy against his employer is payment of compensation benefits. 33 U.S.C. § 905(a). Though the LHWCA also provides workers a negligence remedy against third party vessel owners, the Act expressly eliminates the vessel owner's warranty of

seaworthiness to maritime workers covered by the LHWCA. 33 U.S.C. § 905(b).[2]

This Court recently explained the interaction between the LHWCA and Jones Act:

> The LHWCA provides relief for land-based maritime workers, and the Jones Act is restricted to "a master or member of a crew of any vessel". . . ."[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute. . . . With passage of the LHWCA, Congress established a clear distinction

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[2]In 1972, Congress amended the LHWCA. The amendments increased compensation benefits, expanded LHWCA coverage to certain workers injured ashore, eliminated the vessel owner's warranty of seaworthiness to workers covered by the LHWCA and eliminated the vessel's right to an indemnity from the worker's employer. Director, Office of Workers' Compensation Programs v. Perini N. River Assocs., 459 U.S. 297, 313 (1983); G. Gilmore & C. Black, The Law of Admiralty 411 (2d ed. 1975).

between land-based and sea-based maritime workers.

Wilander, 111 S. Ct. at 813. Thus, "seaman" under the Jones Act and "member of a crew" under the LHWCA exclusion are the same. Id. at 813-16; Swanson v. Marra Brothers, Inc., 328 U.S. 1 (1946).

The Fourth Circuit held that Harwood was engaged in "maritime employment" and was not a "master or member of a crew" excluded from LHWCA coverage. Therefore, the court held, Harwood was covered by the LHWCA and not entitled to a warranty of seaworthiness. Harwood, 944 F.2d at 1192. Because the trial court instructed the jury on Harwood's strict liability unseaworthiness claim, the Fourth Circuit reversed and remanded this case for a new trial based on principles of negligence. Harwood, 944 F.2d at 1190-193.

Harwood's petition presents various arguments for Supreme Court review. These arguments boil down to two contentions: (1) The Fourth Circuit decided this case erroneously; and (2) This case is important because the Fourth Circuit opinion has broad negative implications for the maritime industry. Both contentions are meritless and neither provides any basis for Supreme Court review. Harwood does not suggest any conflict among the circuits.

B. The Fourth Circuit Decided This Case Correctly; Its Holding Does Not Conflict With Any Applicable Decision of This Court.

The correctness or error of the decision below is generally not a basis for this Court's exercise of its discretionary jurisdiction. Ross v. Moffitt, 417 U.S. 600, 616-17 (1974) ("[t]his Court's review

. . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 222 (6th ed. 1986). Still, Harwood argues in his petition that the Fourth Circuit decision is not consistent with some authorities, including the legislative history of the LHWCA, a 1927 administrative opinion, some district court opinions and opinions of this Court. In fact, the Fourth Circuit opinion represents sound application of well established principles.

The Fourth Circuit applied this Court's recent cases defining "master or member of a crew" under the LHWCA and "seaman" under the Jones Act.[3] See McDermott

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[3]Harwood charges that "the failure of Congress to define "seaman" in the Jones Act, and "master or member of a crew" in the LHWCA leaves a major area of

International, Inc. v. Wilander, ___ U.S. ___, 111 S. Ct. 807 (1991); Herb's Welding v. Gray, 470 U.S. 414 (1985); Director, Office of Workers' Compensation Programs v. Perini N. River Assocs., 459 U.S. 297 (1983). These decisions delineate fully coverage criteria under the LHWCA and provide ample guidance to the maritime industry.[4]

The Fourth Circuit's holding that Harwood was engaged in "maritime

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uncertainty in the law, an uncertainty which seriously affects the rights of this multitude of workers." Petition at—12. This charge ignores the fact that this Court has exhaustively, and recently, defined these terms.

[4]Since 1927, this Court has granted certiorari in over 55 LHWCA cases. M. Sturley, Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases, 67 Tex. L. Rev. 1251, 1274 (1989) (urging that even when there is a intercircuit conflict, "the Supreme Court could safely leave virtually every LHWCA case to the lower courts . . . ").

employment" was based on the undisputed fact that Harwood was injured on navigable waters in the course of his employment. The Fourth Circuit stated:

> It is undisputed that Harwood was injured on the "navigable waters" of the United States, so at the time of his injury, he was engaged in employment that was compensable under the pre-1972 LHWCA.

Harwood, 944 F.2d at 1190. Relying on Perini and Herb's Welding the Fourth Circuit held that since Harwood was covered under pre-1972 coverage criteria, he is covered post-1972. In other words, Harwood was engaged in "maritime employment." Harwood, 944 F.2d at 1191.

Though Harwood contends that he performed traditional seaman's work, he nonetheless denies that he was engaged in "maritime employment." Petition at 17. He argues that "maritime employment" depends on the worker's particular

function and includes only those engaged in "longshoring and ship maintenance operations." Petition at 17. Perini flatly rejected this exact argument, holding that a worker injured in the course of his employment while on navigable waters is engaged in maritime employment "without any inquiry into what he was doing (or supposed to be doing) at the time of his injury." Perini, 459 U.S. at 311, 323-24. Harwood does not attempt to distinguish Perini. He ignores it.

After holding that Harwood was engaged in maritime employment, the Fourth Circuit held that Harwood was not a "master or member of a crew" excluded from LHWCA coverage. Harwood, 944 F.2d at 1191-92. Harwood conceded that he was not a Jones Act seaman by failing to appeal the district court's dismissal of his Jones Act count. The Fourth Circuit, however,

addressed the subject anyway and held that the district court was clearly right - Harwood lacked the requisite connection to any vessel. Harwood, 944 F.2d at 1192. The Fourth Circuit pointed out that "master or member of a crew" under the LHWCA and "seaman" under the Jones Act are equivalent terms. As a result, Harwood, who concededly was not a Jones Act seaman, could not be a "master or member of a crew." Harwood, 944 F.2d at 1191-92. This reasoning correctly equates "master or member of a crew" and "seaman." On this point, the Fourth Circuit relied on decisions of this Court, the Fifth Circuit and First Circuit, which hold that "master or member of a crew" and "seaman" are equivalent terms. Harwood, 944 F.2d at 1191-92 (citing Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946); Senko v. La Crosse Dredging Corp., 352 U.S. 370

(1957); Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059 (1988); Bertrand v. Int'l Mooring & Marine, Inc., 700 F.2d 240 (5th Cir. 1983), cert. denied, 464 U.S. 1069 (1984); McDermott, Inc. v. Boudreaux, 679 F.2d 452 (5th Cir. 1982); Travelers Ins. Co. v. Belair, 412 F.2d 297 (1st Cir. 1969); Hardaway Contracting, Co. v. O'Keefe, 414 F.2d 657 (5th Cir. 1968)). The mutual exclusivity of the LHWCA and the Jones Act is well established. Indeed, it was first recognized by this Court in Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946).

After oral argument, this Court reinforced these decisions with McDermott International, Inc. v. Wilander, ___ U.S. ___, 111 S. Ct. 807 (1991). There, this Court reaffirmed its previous ruling in Swanson that "seaman" under the Jones Act

and "member of as crew" under the LHWCA are the same:

> "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act.
>
> * * *
>
> Whether under the Jones Act or general maritime law, seamen do not include land-based workers. . . . "master or member of a crew" restates who a "seaman" under the Jones Act is supposed to be: a sea-based maritime employee.
>
> * * *
>
> [Swanson held] that "member of a crew" under the LHWCA is the same as "seaman" under the Jones Act.

Wilander, 111 S. Ct. at 813-14, 817. The parties briefed the application of Wilander and the Fourth Circuit held that Wilander confirmed its analysis. Harwood, 944 F.2d at 1192 n.2. Under settled law, therefore, Harwood cannot be a "master or

member of a crew" because he is not a Jones Act seaman.

Wilander also established that, like "maritime employment," the status of a worker as a "master or member of a crew" or a "seaman" should be determined without reference to the worker's particular function. Wilander held that

> "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, [are defined] solely in terms of the employee's connection to a vessel in navigation. . . . It is not the employees particular job that is determinative, but the employee's connection to a vessel.

Wilander, 111 S. Ct. at 817.

This Court recently reinforced this holding in Southwest Marine, Inc. v. Gizoni, 60 U.S.L.W. at 4023. Gizoni, presented the question whether a ship repairman, (an occupation specifically enumerated in the LHWCA definition of

"employee") was a LHWCA employee as a matter of law. Gizoni, 60 U.S.L.W. 4020, 4023 (Dec. 4, 1991). Reiterating its holding in Wilander, this Court held that the question whether a worker is a "seaman" under the Jones Act is a mixed question of law and fact governed by the principles stated in Wilander. Gizoni, 60 U.S.L.W. at 4022. The mere fact that the worker functioned as a ship repairman was not alone sufficient to decide the issue as a matter of law. This Court again stated that "[i]t is not the employee's particular job that is determinative, but the employee's connection to a vessel." Gizoni, 60 U.S.L.W. at 4023 (quoting Wilander, 111 S. Ct. at 817).

These cases establish beyond doubt that "master or member of a crew" under the LHWCA and "seaman" under the Jones Act are the same. Similarly, except for workers

injured ashore and subject to the expanded coverage created by the 1972 amendments, a worker's particular function does not determine whether he is engaged in "maritime employment."

Ignoring these authorities, Harwood relies on South Chicago Coal & Dock v. Bassett, 309 U.S. 251 (1940), and Norton v. Warner, Co., 321 U.S. 565 (1944), for the proposition that "master or member of a crew" includes all "workers who perform the traditional work of seamen" or who are on the vessel "naturally and primarily to aid in navigation of the vessel." Petition at 10-11. The argument is flawed because this Court recently rejected Bassett and Norton. These cases held that the LHWCA "master or member of a crew" exclusion covered only "those employees on the vessel who are naturally and primarily on board to aid in her navigation."

Bassett, 309 U.S. at 260. In Wilander, this Court stated that the Bassett Court "seemed to be harkening back to an earlier, discarded notion of seaman status." Wilander, 111 S. Ct. at 815. Similarly, this Court observed that Norton "unfortunately . . . carried with it the outmoded aid in navigation language." Wilander, 111 S. Ct. at 816. Referring to its pre-Swanson LHWCA cases, including Bassett and Norton as "wayward case law," this Court observed that: "Diderot may very well have had the previous Supreme Court cases in mind when he wrote, 'We have made a labyrinth and got lost in it. We must find our way out.'" Wilander, 111 S. Ct. at 816 (quoting Johnson v. John F. Beasley Const. Co., 742 F.2d 1054, 1060 (7th Cir. 1984)). Yet, Harwood focuses rigidly on Bassett and Norton. His definition of "master or member of a crew"

remain confounded by the labyrinth that the Court so recently dismantled. He ignores the unanimous Wilander decision, which rejects Bassett and Norton and clarifies this issue. The Fourth Circuit holding, therefore, does not conflict with any applicable decision of this Court.

Harwood also claims that the Supreme Court should review this case to correct footnote 1 of the Fourth Circuit opinion. The footnote states that Seas Shipping v. Sieracki, 328 U.S. 85 (1946), was overruled by the 1972 amendments to the LHWCA. Petition at 17.[5] This footnote is

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[5]Harwood's petition does not state that the Fourth Circuit's reference to Sieracki appears in a footnote. Rather, his petition charges that the Fourth Circuit "held" that Sieracki was overruled "entirely." Petition at 17. The Fourth Circuit's statement, which is correct, is in footnote 1.

Because the Fourth Circuit held that Harwood was covered by the LHWCA, its statement about Sieracki was not necessary

not part of the Fourth Circuit's holding and does not warrant review by the Supreme Court.

Harwood asks this Court to resolve alleged conflicts with legislative history

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to the decision. Sieracki extended the warranty of seaworthiness to a longshoreman who faced seaman's hazards. Thus, under Sieracki, a longshoreman could recover compensation benefits from his employer under the LHWCA and, for the same injury, obtain a full recovery from the vessel owner for breach of the warranty of seaworthiness. The longshoreman was allowed to recover both LHWCA and seaman's remedies for the same injury. Sieracki was expressly overruled by the 1972 amendments to the LHWCA, which eliminated the warranty of seaworthiness as applied to workers covered under the LHWCA. See 33 U.S.C. § 905(b). Where Section 905(b) applies, Sieracki (and any question of its application to workers not covered by the LHWCA) is superseded by the statute. The Fourth Circuit ruled that Harwood is covered by the LHWCA. Therefore, Section 905(b) - not Sieracki - governs applicability of the warranty of seaworthiness. Accordingly, the Fourth Circuit relegated to a footnote its comment on Sieracki. This comment is not part of its holding. See generally G. Gilmore & C. Black, The Law of Admiralty 408-12, 449 (2d ed 1975).

and some district court opinions. He cites no legislative history inconsistent with the Fourth Circuit's holding. Needless to say, this vague allegation of conflicting legislative history does not warrant Supreme Court review. Similarly, Harwood's alleged conflict with district court opinions does not warrant Supreme Court review. See R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 207 (6th ed. 1986) ("The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or another circuit.").

Harwood also argues that the Fourth Circuit ruling is wrong because it apparently conflicts with a 1927 administrative opinion. Petition at 14-15.

See Longshoremen's Act, Opinion No. 22, 1928 A.M.C. 263 (U.S. Employees' Compensation Commission 1927). This apparent conflict does not, however, provide any basis for Supreme Court review. Indeed, the opinion was superseded in 1946 by this Court's changed interpretation of coverage under the LHWCA. See Swanson, 328 U.S. at 6-7; Wilander, 111 S. Ct. at 813-17. As this Court stated in Wilander, the 19 years between enactment of the LHWCA in 1927 and the Swanson opinion in 1946 was a period "during which the Court did not recognize the mutual exclusivity of the LHWCA and the Jones Act." Wilander, 111 S. Ct. at 814. The Court added that "Bassett was decided before Swanson, at a time when the Court viewed 'seaman' as a broader term than 'member of a crew.'" Wilander, 111 S. Ct. at 815. Indeed, consistent with

Bassett, the administrative opinion is based on the now discredited "aid in navigation" test. 1928 A.M.C. at 264 ("the pilot merely takes over for the time being some of the duties pertaining to navigation . . ."). Rather than rely on an out-dated pre-Swanson administrative opinion, the Fourth Circuit correctly relied on the post-Swanson opinions of this Court, the Fifth Circuit and First Circuit.

In any event, the administrative opinion is not helpful because it does not state the particular facts of the case. As this Court recently held, "the question who is 'a member of a crew,' and therefore who is a 'seaman,' is better characterized as a mixed question of law and fact. . . . *The inquiry into seaman status is of necessity fact-specific;* it will depend on the nature of the vessel and the employee's

precise relation to it." Wilander, 111 S. Ct. at 818 (emphasis added). The Fourth Circuit holding may not contradict the administrative opinion. That depends on the particular facts in the administrative proceedings, which are unknown. For these reasons, this Court should not review this case to resolve a potential conflict between the well founded Fourth Circuit holding here and a 1927 pre-Swanson administrative opinion.

Though Harwood's contentions present no legitimate basis for Supreme Court review and are flatly contradicted by decisions of this Court, he charges that the Fourth Circuit holding "is a clear aberration." To the contrary, each element of the Fourth Circuit's reasoning is supported by holdings of this Court and the Courts of Appeals. Indeed, this Court recently addressed these coverage issues in

Wilander. The Fourth Circuit's application here of the principles stated in Swanson, Wilander, and Perini does not conflict with authority from any other Court of Appeals. Absent any conflict among the circuits, this Court should not revisit issues so recently decided.

C. **The Fourth Circuit's Holding Was Narrow And Fact-Specific; It is Not of National Significance.**

To elevate the importance of this case, Harwood overstates the Fourth Circuit's holding. Harwood quotes the Fourth Circuit as expressly holding that "the Jones Act and LHWCA constitute the entire universe of coverage for maritime workers performing navigational duties." Petition at 7-8. This quotation was actually lifted from the dissenting opinion, and attributed to the panel majority without citation. Harwood, 944 F.2d at 1195.

Harwood argues from this that the Fourth Circuit held that "every maritime worker must inevitably" be covered by the Jones Act or LHWCA. Petition at 8.

To the contrary, the Fourth Circuit made no ruling affecting "all maritime workers." Indeed, the LHWCA expressly excludes from coverage eight categories of maritime workers. 33 U.S.C. § 902(3)(A)-(H). Similarly, officers and employees of the United States are excluded from coverage. 33 U.S.C. § 903(b). To be sure, some of these excluded workers are not Jones Act seamen. The Fourth Circuit did not address other workers or other exclusions not implicated by the facts or pleadings in this case. The Fourth Circuit held only that a harbor pilot who concededly is not a Jones Act "seaman" cannot be a "master or member of a crew"

under the LHWCA. Harwood, 944 F.2d at 1190.

Harwood finds broad implications in this holding. He asserts that "member of a crew" includes "workers who perform traditional work of seamen" (Petition at 10) or "all persons employed on board ships . . . [who] promote the purposes of the voyage" (Petition at 24). He concludes that "member of a crew" is broader than "seaman." Harwood claims that, under the Fourth Circuit holding, a "multitude of workers" heretofore considered "members of a crew" are now stripped from the excluded class and deprived their "vital" strict liability unseaworthiness remedy. Petition at 7-14. These so-called non-Jones Act "members of a crew" now face the "monumental burden of proving negligence" before recovering money from vessel owners. Petition at 13.

Because the Fourth Circuit ruling affects these multitudes, Harwood argues, this case is important and warrants review by this Court. This theory is, at best, novel and, at worst, unfounded legal conjecture not supported by this Court's decisions.

Harwood includes in his multitude, among others, "night mates, shore engineers, shore gangway watches, line handlers, and other workers who perform traditional work of seamen." Petition at 10. In fact, since 1946, courts have had no difficulty ruling that shore-based maritime workers are, like Harwood, covered by the LHWCA, whether or not they were engaged in traditional seaman's work. See, e.g. Perini, 459 U.S. at 311 n.21; Levene v. Pintail Enterprises, Inc., 943 F.2d 528 (5th Cir. 1991) (linehandler injured on a barge covered by the LHWCA); Nalco

Chemical Corp. v. Shea, 419 F.2d 572 (5th Cir. 1969) (a pilot salesman traveling to an offshore platform covered by the LHWCA); Interlake S.S. Co. v. Neilson, 338 F.2d 879 (6th Cir. 1964) (watchman covered by the LHWCA), cert. denied, 381 U.S. 934 (1965); Rex Navigation and Patrol Agency, Inc. v. Collura, 329 F. Supp. 696 (E.D.N.Y. 1971) (land-based employee sent temporarily onto vessel to act as watchman covered by the LHWCA); Ford v. Parker, 52 F. Supp. 98 (D. Md. 1943) (night watchman covered by the LHWCA). Harwood's multitude does not exist.

Harwood's expansive definition of "master or member of a crew" is based on Bassett and Norton. As discussed above, their definition of "master or member of a crew" was expressly rejected by this Court in Wilander. Harwood also cites two Fourth Circuit cases, Stephenson v. McLean

Contracting Co., 863 F.2d 340 (4th Cir. 1988), cert. denied, 109 S. Ct. 2110 (1989), and Whittington v. Sewer Const. Co., 541 F.2d 427 (4th Cir. 1976). Both cases are Jones Act cases not involving workers covered by the LHWCA. Both cases define "seaman" as a "master or member of a crew." Stephenson, 863 F.2d at 341. In this respect, they support the Fourth Circuit's analysis in Harwood.[6]

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[6]Harwood argues that the Fourth Circuit holding in this case conflicts with Stephenson and Whittington. He claims that these cases cannot be harmonized with footnote 1 of the Harwood opinion, which states that Sieracki was overruled by the 1972 amendments to the LHWCA. This ostensible conflict, however, is more imagined than real. Even Harwood concedes that employees covered by the LHWCA are not entitled to a warranty of seaworthiness. Harwood merely begs the question by insisting that an unseaworthiness remedy exists for those outside the reach of the LHWCA. That threshold coverage question is, after all, the issue in this case. Nothing in Stephenson or Whittington addresses this question. They do not conflict with the Fourth Circuit's holding.

Moreover, Harwood's unprecedented argument that "member of a crew" under the LHWCA is broader than "seaman" under the Jones Act, if accepted, would conflict with the purpose of the LHWCA and dramatically reduce the number of workers covered by the LHWCA. As this Court held in Wilander, "[w]ith the passage in the LHWCA, Congress established a clear distinction between land-based and sea-based maritime workers." Wilander, 111 S. Ct. at 813. Congress sought to provide compensation remedies for land-based workers while preserving to sea-based

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Even if there was a conflict, there is no basis for Supreme Court review. Davis v. United States, 417 U.S. 333, 340 (1974) ("decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself.").

workers their Jones Act remedies. Wilander 111 S. Ct. at 815. This coverage distinction is accomplished through the exclusion from LHWCA coverage of "a master or member of a crew." Wilander, 111 S. Ct. at 813-14. Congress's purpose of distinguishing between land-based and sea-based maritime workers is satisfied only if "master or member of a crew" is the same as "seaman."

Harwood cites no case holding that "master or member of a crew" is broader than "seaman." This Court once considered the inverse to be true — that "seaman" was broader than "member of a crew." Bassett, 309 U.S. at 260. Thus, longshoremen, who were considered "seamen" because they "[do] seaman's work," (Sieracki, 328 U.S. at 99; see International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926), but were not "members

of any crew," were entitled to LHWCA and seaman's remedies at the same time. See supra n.5. But this error was corrected in Swanson and Wilander where the Court recognized the mutual exclusivity of the Jones Act and LHWCA. 111 S. Ct. at 815.

Harwood takes a new approach. He inverts the equation by asserting that "master or member of a crew" is broader than "seaman." Thus, "workers who perform traditional work of seamen" (Petition at 10) or "all persons employed on board ships . . . [who] promote the purposes of the voyage" (Petition at 24) are "members of a crew" excluded from LHWCA coverage. If accepted, this interpretation would eviscerate the LHWCA. Under Harwood's anomalous theory, longshoremen who are land-based but do traditional work of seamen would be excluded from LHWCA coverage as members of a crew. See

Sieracki, 328 U.S. at 99. Harwood's formula ignores Congress's land-based/sea-based distinction, see Wilander, 111 S. Ct. at 817, and this Court's rejection of an occupational test for "member of a crew" or "seaman" status. Harwood's odd interpretation of the LHWCA does not deserve this Court's attention.

In sum, the Fourth Circuit's narrow holding in this case does not implicate coverage for a "multitude" of workers. This case is not of national significance.

IV. Conclusion

The Fourth Circuit holding in this case represents a sound application of well established principles of LHWCA interpretation. The Fourth Circuit's decision does not conflict with any applicable decision of this Court or with any other Court of Appeals. Though

important to the parties, the Fourth Circuit holding is not of national significance.

For these reasons, the Respondent asks this Court to deny Harwood's Petition.

Respectfully submitted,

PARTREDEREIT af. 15.5.81

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Supreme Court, U.S.
FILED
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Docket No. 91-1110

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

WALLACE S. HARWOOD, JR.,

Petitioner,

v.

PARTREDEREIT af. 15.5.81,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

OPINION OF THE UNITED STATES DISTRICT COURT..1

ORDER DENYING REHEARING.....14

WALLACE S. HARWOOD, JR., *Plaintiff*

v.

PARTREDEREIT AF 15.5.81, *Defendant*

United States District Court,
Eastern District of Virginia
(Norfolk Division)
January 3, 1990
Civil No. 89-638-N

PERSONAL INJURY - 13147.
Miscellaneous Persons - PILOTS - 153.
Damages for Injury and Death - SEAMEN - 11.
Who Are, Definition, Crew.

Harbor pilot, injured when ship's ladder gave way, is not a Jones Act seaman because he was not permanently attached to the vessel. Whether he is entitled to claim for unseaworthiness, *not decided* pending development of additional facts.

Peter W. Rowe (Stackhouse, Rowe & Smith) for *Plaintiff Harwood*
Philip N. Davey (Hunton & Williams) for *Defendant Partredereit*

ROBERT G. DOUMAR, D.J.:

This matter came before the Court on December 12, 1989, on a motion for partial summary judgment. For the reasons stated below, the Court grants defendant's motion for summary judgment regarding plaintiff's status

as a seaman under the Jones Act and denies without prejudice defendant's motion for summary judgment as to plaintiff's status as a seaman regarding the doctrine of warranty of seaworthiness. The reasons for this Court's decision are set forth below.

I. *Facts*

On the night of December 16, 1987, M/V *Captain Most*, an oceangoing ship, approached the Hampton Roads port, off the shore of Cape Henry, Virginia. Plaintiff, a licensed Virginia branch pilot, approached the ship in a pilot launch in order to pilot the vessel into the harbor in accordance with Virginia law.

A pilot's ladder was lowered from the *Captain Most* by officers and crew members of the ship for plaintiff's use in boarding the

vessel. While he was climbing up the ladder, the ladder broke and plaintiff fell into the water. Plaintiff alleges that this fall caused him to suffer a torn rotator cuff and other injuries that now prevent him from working a full schedule.

II. *Plaintiff's Status Under the Jones Act*

The Fourth Circuit test for Jones Act seaman status was set forth in *Whittington v. Sewer Construction Co.*, 451 F.2d 427, 436 (4 Cir. 1976) and has been reiterated in *Stephenson v. McLean Contracting Co.*, 1989 AMC 728, 729, 863 F.2d 340, 341 (4 Cir. 1988) cert. denied, 490 U.S._____(1989). *Stephenson* says:

> "The Court [in *Whittington*] identified three requirements for a worker to be considered 'a member of a crew:' (1) the

worker must be more or less permanently attached to a vessel or fleet; (2) the worker must be one whose duties serve naturally and primarily as an aid to navigation in the broadest sense; and (3) the vessel must be in navigation."

Plaintiff, here, fails the first prong of this test. He was in no way "more or less permanently attached" to the *Captain Most*. Plaintiff, in his affidavit, states, "Plaintiff practices his profession as an individual. He has no employees and is not employed by anyone." The record is devoid of any evidence that plaintiff was assigned permanently to the *Captain Most* or performed a substantial part of his work aboard that vessel or any other vessels having any connection with defendant. Cf. *Bach v. Trident Shipping Co., Inc.*, 708 F.Supp. 772 (E.D.La. 1988).

Plaintiff's argument that each pilot who guides a vessel into port in Virginia is permanently attached to that vessel for that period of time is unpersuasive to this Court. As this Court stated in *Complaint of Falkiner (Sailing Vessel Wan Fu)*, 1989 AMC 796, 808 (E.D.Va. 1988), "the connection may be less permanent...but it cannot be temporary or transitory."

In this case, plaintiff's relationship to the vessel was solely temporary or transitory. He came aboard only long enough to guide the ship into port. He did not become permanently attached so as to be afforded Jones Act seaman status. *Whittington* says:

> "The Supreme Court has held that the passage of the Longshoremen's and Harbor Workers' Compensation Act...[hereinafter L.H.W.C.A] shows that Congress intended

to '*confine* the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters...'" 541 F.2d at 436 (emphasis added).

Summary judgment is appropriate with regard to plaintiff's Jones Act claim. See *Lewis v. Roland E. Trego & Sons, Inc.*, 359 F.Supp. 1130, 1132 (D.Md. 1973), modified on other grounds, 501 F.2d 372 (4 Cir. 1974). See also Schoenbaum, *Admiralty and Maritime Law*, §5-5 (1987 and 1989 Supp.) (the courts are now routinely denying seaman status in questionable cases and making it clear that the district courts can take this issue away from the jury and decide it on motion for summary judgment or motion for judgment notwithstanding the verdict). Accordingly, because plaintiff in no way satisfies the permanency prong of the Jones Act test, summary judgment for defendant is granted and

plaintiff's claim under the Jones Act is dismissed.

III. *Plaintiff's Status under the Warranty of Seaworthiness*

A grant of summary judgment is appropriate when the case shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Federal Rule of Civil Procedure 56(c)). Such is not the case here.

The warranty of seaworthiness originally arose to protect a narrow class of people - those who qualify as seamen under the law. Schoenbaum, *Admiralty and Maritime Law*, §5-4 (1987). In the case of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 1946 AMC 698 (1946), rehearing denied, 328 U.S. 878 (1946), the

doctrine was expanded to apply to a longshoreman who was not directly employed on the vessel on which his injury occurred. The Court accorded the plaintiff in *Sieracki* seaman status because he was facing the hazards that seamen face and was performing a function essential to maritime service aboard ship. In 1972 Congress amended the LHWCA, providing that no employee covered by the LHWCA may assert a cause of action for unseaworthiness. Congress also expanded the classes of workers covered by the LHWCA.

Defendant vigorously argues that the 1972 amendments to the LHWCA created two mutually exclusive categories of workers - longshoremen and seamen - and that only seamen are entitled to the warranty of seaworthiness. See *Bach*, supra, at 775 (a marine worker is either a seaman or an LHWCA employee [under Fifth Circuit law]). See also *United States Lines*,

Inc. v. United States, 593 F.2d 570, 572 (4 Cir. 1979) (Congress overruled the *Sieracki-Ryan* form of action with the 1972 amendments to the LHWCA). However, *United States Lines, Inc.* dealt with a federal civil service longshoreman who is clearly within the purview of the LHWCA.

The Fourth Circuit has no case directly on point. However, *Whittington*, supra, at 433 and 435, states:

> "There is a failure on the part of the plaintiff to distinguish 'seaman' from 'one who does the work of a seaman.' ...The phrase 'one who does the work of a seaman' is used to define the class of workers who are protected by the warranty of seaworthiness...' and 'it seems that the plaintiff fails to distinguish the scope of the remedy available under the

> Jones Act and the scope of the remedy available under the warranty of unseaworthiness. Since the standards are different under the two theories of recovery, there is a difference in the remedies and coverage."

In *Lewis v. Roland E. Trego & Sons*, 501 F.2d 372 (4 Cir. 1974), this Circuit also states:

> "[plaintiff's] claim of unseaworthiness stands on a different footing [than his Jones Act claim]. The district court properly recognized that a shore-based employee doing a seaman's work on his employer's vessel in navigation can recover for injuries caused by unseaworthiness, although he is not a member of the crew."

It should be noted that both *Whittington* and *Lewis* were decided after the 1972 amendments to the LHWCA.

Defendant contends that this Court's decision in *Wan Fu* is controlling and that *Wan Fu* held that *Sieracki* seamen must satisfy the tests applied to Jones Act seamen in order to be afforded the protection of the warranty of seaworthiness. However, the claimants in *Wan Fu* presented their case on the proposition that, while on board the *Wan Fu*, "they were seamen under the Jones Act and therefore owed a warranty of seaworthiness." *Complaint os Falkiner (Vessel Wan Fu)*, 1989 AMC 796, 798, 803 (1988). That case is not determinative under the present status of the facts in this case.

The state of the law as applied renders summary judgment inappropriate at this point.

See *Stephenson*, supra, 1989 AMC at 729-30, 863 F.2d at 341. There is a factual conflict as to exactly who plaintiff's employer was. There is dispute about the status of the Virginia Pilot's Association. There is an unresolved fact question regarding the amount of freedom the master of a vessel has to accept or reject a pilot from the Virginia Pilot's association and when, if the pilot is undertaken, the pilot actually begins to function as such and when he is or is not employed if he may be rejected. His status must be established as well as his authority and position at the time and place of the alleged injury.

Accordingly, at this time defendant's motion for summary judgment with regard to plaintiff's claim for unseaworthiness is denied without prejudice to raise it again at an appropriate time.

The Clerk is directed to enter judgment for the defendant on the basis of plaintiff's Jones Act claim only.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 8, 1991

No. 90-2351

WALLACE S. HARWOOD, JR.

Plaintiff - Appellee

v.

PARTREDEREIT AF 15.5.81

Defendant - Appellant

No. 90-2359

WALLACE S. HARWOOD, JR.

Plaintiff - Appellant

v.

PARTREDEREIT AF 15.5.81

Defendant - Appellee

On Petition for Rehearing with Suggestion
for Rehearing in Banc

Appellee/cross-appellant filed a petition for rehearing with suggestion for rehearing in banc.

Judge Ervin voted to grant panel rehearing. Judge Chapman and Judge Norton voted to deny.

No member of the Court requested a poll on suggestion for rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Chapman, with the concurrence of Judge Ervin and Judge Norton.

For the Court,

JOHN M. GREACEN

Clerk